No. 92-207

In The
Supreme Court of the United States
October Term, 1992

United States of America,

Petitioner,

v.

Xavier V. Padilla, et al.,

Respondents,

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS XAVIER PADILLA, MARIA PADILLA AND JORGE PADILLA

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QUESTION PRESENTED

Contrary to Petitioner's suggestion, the question presented is not whether mere membership in a conspiracy alone entitles an individual to raise a Fourth Amendment challenge to the seizure and search of a coconspirator; the actual question presented is whether, under the totality of the circumstances, the evidence established that each Respondent's privacy or possessory rights were violated by the unlawful seizure and search at issue.

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STATEMENT OF THE CASE

I. Proceedings below

Respondents were each charged with one count of possession of cocaine with the intent to distribute (21 U.S.C. §841(a)(1)) and one count of conspiracy to commit that offense (21 U.S.C. §846) in a single indictment in the District of Arizona. Much of the evidence supporting the prosecution's case emanated from the seizure of an automobile owned by Respondents Maria Simpson and Donald Simpson and under the supervision of Respondent Xavier Padilla. A search of the trunk revealed wrapped packages; a search of the packages revealed cocaine. The district judge, Hon. Richard M. Bilby, found that the seizure of the car and its contents violated the Fourth Amendment and suppressed the evidence as to all six Respondents. Because that ruling disposed of the entire case, the

court was not called upon to decide the validity of the subsequent searches or Respondents' abilities to challenge those searches.

The government appealed to the Ninth Circuit Court of Appeals. Petitioner conceded that the seizure was illegal, but claimed that the seizure did not violate Respondents' rights. *United States v. Padilla*, 960 F.2d 854, 858 (9th Cir. 1992)(Pet. App. 1a-21a). After examining the evidence relevant to the privacy interests of each Respondent, the court concluded that the record was insufficient to determine whether the district court was correct in its finding that Respondents Maria Padilla and Jorge Padilla had the right to challenge the illegal seizure and therefore remanded the case for further evidentiary hearings. *Id.* at 861. The court held

that Respondent Warren Strubbe's rights were not implicated in the illegal seizure and reversed the suppression order as to him.[1] The court affirmed the suppression order as to Xavier Padilla, Maria Simpson and Donald Simpson. *Id.* at 860-861. The court did not address the search of the car or the packages found in the trunk.

II. Pertinent evidence

The evidence before the district court consisted of proffers and documents supplied by defense counsel. The government did not object to this procedure, nor did it present evidence in opposition.

Respondents' charges resulted from their participation in an ongoing cocaine

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[1]The court of appeals rulings regarding Maria Padilla, Jorge Padilla and Warren Strubbe are not contested here.

importation and transportation organization run by an individual known as "El Tejano". Xavier Padilla had worked for the organization for four or five years, transporting contraband from the border town of Douglas, Arizona to Phoenix; he would then return to Douglas with cash payments. On September 26, 1989, Xavier Padilla met with Maria Simpson and other principals in the "El Tejano" organization. They discussed bringing cocaine into the United States and through Arizona to California the next day, September 27. SER[2] at 3.

On the 27th, the cocaine was driven into the United States by Sylvia Simpson in a car she owned with her husband, Donald Simpson, a United States Customs

[2]Respondents' (Appellees') Supplemental Excerpt of Record in the court of appeals.

agent. *Id.* 3-5, 13; 960 F.2d at 860. Xavier Padilla had the "ultimate responsibility" for seeing that the car and its contents were successfully driven to Phoenix and on to California. 5/8/90 Tr. 70-73; 960 F.2d at 860. Xavier Padilla therefore left his home in Douglas, the town where the cocaine crossed the border, and travelled to Tempe, a suburb of Phoenix, approximately two hundred twenty miles away. He did so in order to be available should any problems arise during the trip to Phoenix. 5/8/90 Tr. 71; 5/30/90 Tr. 69-73, 106-111. Once the car had safely reached its final destination, Xavier Padilla was to return to Douglas with the payment for the contraband. SER 3, 14.

The first driver, Luis Arciniega, was hired by Xavier Padilla to drive the

car to Tempe, where he would be replaced by others for the remainder of the trip. 5/8/90 Tr. 71; SER 12-14. While in Tempe, Xavier Padilla was in regular telephone contact with another person in Douglas who was assisting in monitoring the car's progress. SER 3-5, 12-13. Arciniega was to call Xavier Padilla for instructions if any problems arose. 5/8/90 Tr. 70-73.

Arciniega was alone in the car when a state highway patrol officer illegally stopped it between Douglas and Tempe. A search of the trunk revealed packages wrapped in white paper, labeled "pollo", the Spanish word for chicken. SER 77. The police opened the packages and found cocaine.[3] Arciniega then agreed to

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[3]The validity of the search of the car and the search of the packages independent of the taint from the illegal initial seizure of the car and its

cooperate with the police. Both the car and Arciniega were taken to a motel in Tempe, where Arciniega - following prior instructions from Xavier Padilla - telephoned Mr. Padilla at his sister's house, which was also in Tempe. Arciniega told Xavier Padilla that the car had arrived safely, albeit late. *Id.* 70-71. Xavier Padilla immediately sent his wife and his brother, Respondents Maria Padilla and Jorge Padilla, to take the car from Arciniega. *Id.* 4. When the Padillas arrived at the motel and attempted to take the car, they were arrested. Following a lead from Maria, government agents went to Mr. Padilla's sister's home, where they located and spoke with Mr. Padilla.

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contents was never litigated or decided in the district court or the court of appeals.

In concluding that Mr. Padilla's Fourth Amendment rights were implicated by the seizure and search at issue, the court of appeals stated:

> Xavier Padilla, for his part, exhibited substantial control and oversight with respect to the transportation through Arizona. DEA Agent Plover testified to the Grand Jury that he believed that Xavier Padilla probably had ultimate responsibility for the contraband on the day of the stop.

960 F.2d at 860 & n. 4.

SUMMARY OF ARGUMENT

Respondents do not claim *per se* standing by virtue of their mere membership in a joint venture. The Ninth Circuit Court of Appeals analyzes standing from a totality of circumstances standpoint, including, *inter alia*, whether or not a claimant is a member of a joint venture and their relationship to the place searched and/or the property

seized. This analysis is consistent with prior precedent of this Court.

The ruling of the Ninth Circuit Court of Appeals in this case demonstrates that there is no *per se* standing rule based solely on mere membership in a conspiracy or a joint venture. Three of the Respondents herein were found by the Ninth Circuit <u>not</u> to have standing on the record presented in spite of their membership in a joint venture.

Respondent Xavier Padilla does not seek to vicariously assert the rights of Luis Arciniega. Xavier Padilla had a possessory interest in the car and its contents which were seized in the illegal stop. The district court found that the stop was not based on reasonable suspicion. That finding was not challenged on appeal. Further, Xavier

Padilla had a reasonable expectation of privacy in the automobile and its contents under the facts of this case.

A citizen's standing to raise a claim of illegal search or seizure is not dependant upon mere physical presence at the time of the search or seizure or actual possession of the property at the time it is seized. Prior precedent of this Court recognizes that an individual may have standing to challenge a search and/or seizure even though the property was not in their possession and they were not present at the time of the search and/or seizure. Actual possession and physical presence, like membership in a joint venture, are merely factors to be considered. No single factor is dispositive in either direction in a standing analysis.

ARGUMENT

I. Introduction

Contrary to the government's claim, the issue presented is not whether Respondents Xavier Padilla, Maria Simpson, and Donald Simpson have a Fourth Amendment right to object to the unlawful stop of coconspirator Luis Arciniega.[4] Respondents are not attempting to vicariously assert Arciniega's personal Fourth Amendment rights. Nor, contrary to Petitioner's assertions, did the court of appeals base its decision on Respondents' mere status as coconspirators with Arciniega.[5] In fact, that court's opinion in this case demonstrates that the court analyzed the privacy interests of each Respondent separately, granting relief to three,

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[4]Petitioner's brief at (I).

[5]*Id.* at 10, 19.

remanding for additional evidence as to two, and reversing the suppression order as to one. If, as Petitioner states, the Ninth Circuit rule is that mere membership in a joint venture alone confers standing, the court of appeals would have given Jorge Padilla, Maria Padilla and Warren Strubbe standing.

The question that is actually before this Court is whether Xavier Padilla - as custodian and manager of a vehicle used for a commercial purpose - and the Simpsons - as owners of that vehicle - have the right to object to the illegal seizure and search of that vehicle.

The undisputed evidence established that Xavier Padilla, per an agreement with the Simpsons, used the car as a container and conveyance to transport contraband. By secreting the contraband in wrapped packages in the locked trunk,

travelling "virtually along with" the vehicle[6], and being constantly available to handle any problems that might arise during the trip[7], Xavier Padilla established far greater property and privacy rights in the car and its contents than an individual who simply closes a box and sends it through the mail. In *United States v. Jacobsen*, 466 U.S. 109, 114 (1984), the defendant sent a cardboard box by a private courier service. This Court held that Jacobsen had the right to object to the subsequent seizure and search of the package by police officers. The fact that Jacobsen was not present at the time of the

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[6]960 F.2d at 860; 5/8/90 Tr. 69-73, 106-111.

[7]5/8/90 Tr. 70-73. In fact, after Arciniega was arrested and agreed to cooperate, he called Mr. Padilla who, like Arciniega, had travelled to Tempe, Arizona. SER 12-13, 70-71.

seizure and search did not deprive him of standing.

II. Certiorari was improvidently granted

A. Certiorari should be reconsidered in light of this Court's recent pronouncement in *Soldal v. Cook County*.

In the district court, the appellate court, and in the briefs questioning the granting of certiorari by this Court, the parties focused only on the issue of whether Respondents had a reasonable expectation of privacy in the vehicle that was seized and searched. The district and appellate courts analyzed and decided the case in the same fashion.[1]

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[1]Petitioner's brief, at 19, recognizes that the appellate court did not decide whether the search of the car was lawful.

Only days before the government's brief was filed, this Court issued its decision in *Soldal v. Cook County*, 113 U.S. 538 (1992), reiterating that the Fourth Amendment prohibits not only unreasonable searches, but also unreasonable seizures. The Court also reminded judges and litigators that searches and seizures are subject to distinct tests to determine their legality. The legality of a search is subject to attack if a reasonable expectation of privacy is violated; a seizure may be challenged when a government official meaningfully interferes with an individual's possessory interest in property. In any given case, a person may have a privacy interest, but not a possessory interest, or vice-versa. For example, *Soldal* quoted *United States v. Place*, 462 U.S.

696, 708 (1983), stating that "although we found that subjecting luggage to a 'dog sniff' did not constitute a search for Fourth Amendment purposes because it did not compromise any privacy interest, taking custody of Place's suitcase was deemed an unlawful seizure for it unreasonably infringed 'the suspects possessory interest in his luggage.'" *See also Walter v. United States*, 447 U.S. 649, 654 (1980).

The question of whether Respondents' proprietary and possessory interests were violated by the seizure of the car and its contents was never addressed or decided in the district or appellate courts. Petitioner is therefore asking this Court to decide issues that were not litigated or decided below. Under these circumstances, this matter must be summarily remanded to the district court

for further proceedings in light of the decision in *Soldal*. *Riggins v. Nevada*, ___ U.S. ___, 112 S.Ct. 1810, 1814 (1992); *Taylor v. Freeland & Kronz*, ___ U.S. ___, 112 S.Ct. 1644, 1649 (1992); *Berkemer v. McCarty*, 468 U.S. 420, 443, n. 38 (1984).

B. Prior decisions of the court of appeals are consistent with this Court's decisions.

The Ninth Circuit Court of Appeals has used the term "joint venture" in analyzing expectation of privacy issues. In using this term, the court has done nothing more than recognize that legitimate privacy interests can arise when: 1) a property owner allows others to use or control the property;[9] or 2) pursuant to a business agreement, two or

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[9]As in *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984).

more people share responsibility for particular property.[10] Both propositions are entirely consistent with this Court's decisions. As to the first, *see, e.g., Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990); *United States v. Jeffers*, 342 U.S. 48, 50 (1951); as to the second, *see, e.g., Mancusi v. DeForte*, 392 U.S. 364, 368-369 (1968). The court of appeals has done nothing more than follow this Court's edict that the Fourth Amendment not be controlled by "'arcane' concepts of property law . . ." *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980), *quoting Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

The court of appeals has never ruled that mere membership in a conspiracy supports a Fourth Amendment interest in

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[10]As in *United States v. Johns*, 851 F.2d 1131, 1136 (9th Cir. 1988).

the property of a coconspirator. It has ruled that such an interest may arise in a given case based on an agreement with a coconspirator that gives the challenging party control over the place searched or property seized. In so ruling, the court has done nothing more than consider the totality of the evidence - as opposed to "'arcane' concepts of property law" - as required by Supreme Court precedent. *Id.; Oliver v. United States*, 466 U.S. 170, 177-178 (1984). It must be remembered that a conspiracy is nothing more than an agreement between individuals to commit a crime. *Pinkerton v. United States*, 328 U.S. 640, 644 (1946). Criminal conspiracies - like legitimate business deals - often include agreements that grant participants the control or use of property that they do

not own. *See Mancusi v. DeForte*, 392 U.S. at 368-369.

Petitioner also relies heavily on another similar misconception. Petitioner contends that Xavier Padilla cannot assert a constitutional objection to the illegal seizure and search because he was not physically present at that time. If this case had arisen from the seizure and search of Arciniega, without an accompanying seizure and search of the car and the packages in the trunk, Petitioner would be correct. Respondents' expectation of privacy in the car, the trunk, and the packages permits them to challenge the unlawful intrusion. This Court has never held that a person with a reasonable expectation of privacy in a place must be on the scene in order to be able to assert a Fourth Amendment challenge to an

illegal search. *See, e.g., United States v. Jacobsen*, 466 U.S. at 114; *United States v. Alderman*, 394 U.S. 165, 176 (1969); *United States v. Jeffers*, 342 U.S. at 50. In fact, an individual may be present at the scene of the search, but still lack a reasonable expectation of privacy and therefore be precluded from raising a Fourth Amendment challenge. *Rawlings v. Kentucky*, 448 U.S. at 105; *Rakas v. Illinois*, 439 U.S. at 148.

Petitioner's misinterpretation of Ninth Circuit precedent is best seen by reviewing the hypothetical at page 18, n. 6, of the government's brief. There, Petitioner claims to apply "the Ninth Circuit's coconspirator doctrine . . .." Under that "doctrine", Petitioner alleges that the illegal seizure of A's address book from A, would permit coconspirator B

to object to lawful searches of property belonging to B or to others, if those searches were based on information found in A's address book. If the court of appeals made such a ruling, it would indeed violate this Court's decisions. Under precedents issued by both this Court and the court of appeals, B would have a right to object to the search and seizure of A's address book only if B either: 1) had a legitimate expectation of privacy in the place searched; or 2) B had a possessory or proprietary interest in the book itself, such as joint ownership, control or use of the book.[11]

Petitioner relies on two decisions from this Court, neither of which supports the government's position.

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[11]Xavier Padilla would have the right to object under both scenarios.

Petitioner's brief at 15-16. In *United States v. Alderman*, 394 U.S. at 172, the Court held that coconspirators do not have a right to object to a search or seizure of a confederate simply by their status as coconspirators. The court of appeals did not rule to the contrary in this case or any other.

Petitioner also attempts reliance - unsuccessfully - on the decision in *Brown v. United States*, 411 U.S. 223 (1973). There, two thieves attempted to object to the search of a coconspirator's store and the seizure of property the thieves had previously stolen. *Id.* at 224-226. This Court held that Brown was properly denied the right to object to the search of the store and the seizure of the property because: 1) he alleged no proprietary or possessory interest in the store; 2) he was not present at the time of the search

and seizure; and 3) he had sold the stolen property to the store owner two months before the search[12]. *Id.* at 229. The present case is far different. Here, Mr. Padilla maintained a proprietary interest in the car and its contents at the time of the seizure and search.

The Ninth Circuit Court of Appeals has consistently followed the mandates of this Court in applying the Fourth Amendment.[13] While some of the lower

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[12]The Ninth Circuit has consistently held that defendants lose their right to object to searches or seizures of property after they sell or otherwise dispose of the property. *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984); *United States v. Culbert*, 595 F.2d 481, 482 (9th Cir. 1979); *United States v. Turner*, 528 F.2d 143, 164 (9th Cir.), *cert. denied*, 96 S.Ct. 426; *United States v. Toliver*, 433 F.2d 867, 869 (9th Cir. 1970).

[13]Petitioner's claim, at 17, that the Ninth Circuit has rendered decisions inconsistent with those of other circuits is similarly incorrect. *See* Opposition to Petition for Certiorari at 14-36.

court's decisions may contain overly broad dictum by reference to "joint ventures" or "coconspirators", the court's conclusions based on the record before it have been correct. By its decision in the present case[14], the court demonstrated that it considers the privacy and possessory interests of each individual and does not base Fourth Amendment interests on mere membership in a conspiracy.

III. <u>The seizure of the car and its contents violated Xavier Padilla's Fourth Amendment rights</u>.

Traditionally, an individual has a cognizable Fourth Amendment interest if

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[14]The court held that only three of the conspirators had standing, while ruling that the record failed to demonstrate that the others had a cognizable Fourth Amendment interest in the car or its contents. 960 F.2d at 863-864.

he has an interest in the property seized or the place searched. In *Soldal* this Court found that a possessory interest in the property seized could confer standing even in the absence of a reasonable expectation of privacy. A reasonable expectation of privacy is an integral element of a standing analysis for either a search or a seizure. In the case at bar Xavier Padilla had both a possessory interest and a reasonable expectation of privacy in the property seized.

A. Possessory interest

Three elemental and irrefutable facts establish that the seizure of the car and its contents violated Xavier Padilla's constitutional rights. First, by stopping the car, the arresting officer seized the car and its contents for purposes of the Fourth Amendment. *See, e.g., Delaware v. Prouse*, 440 U.S.

648, 653 (1979). Secondly, as Petitioner concedes[15], the seizure was made without reasonable suspicion of criminal activity and therefore violated the Fourth Amendment. Finally, Xavier Padilla was given control of the car and its contents by their owners for their mutual business purpose, he hired the driver, and personally oversaw the transporting of the cargo.. The car was nothing more or less than a container being used to transport merchandise.

This Court has consistently and correctly held that people who send packages through the mail or by private delivery service retain a cognizable Fourth Amendment expectation that the packages will not be seized by government agents unless the agents have probable

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[15]Petitioner's brief at 4 & n. 1, 12.

cause or, at the very least, a reasonable suspicion of criminal activity. *United States v. Jacobsen*, 466 U.S. at 114; *Ex parte Jackson*, 96 U.S. 727, 733 (1878). The courts of appeals have unanimously followed this Court's holdings.[16]

The rule urged by the Petitioner would overrule all container cases which confer standing when an individual is not physically present. Courts have consistently recognized that an

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[16]*United States v. LaFrance*, 879 F.2d 1 (1st Cir. 1989); *United States v. Villarreal*, 963 F.2d 770 (5th Cir. 1992); *United States v. Lewis*, 902 F.2d 1176 (5th Cir. 1990); *United States v. Mayomi*, 873 F.2d 1049 (7th Cir. 1989); *United States v. Decker*, 956 F.2d 773 (8th Cir. 1992); *United States v. Longbehn*, 898 F.2d 635 (8th Cir.), *cert. denied*, 111 S.Ct. 208 (1990); *Garmon v. Foust*, 741 F.2d 1069 (8th Cir. 1984); *United States v. Aldaz*, 921 F.2d 227 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2802 (1991); *United States v. Dass*, 849 F.2d 414 (9th Cir. 1988); *United States v. Hillison*, 733 F.2d 692 (9th Cir. 1984); *United States v. Lux*, 905 F.2d 1379 (10th Cir. 1990).

individual may maintain a cognizable Fourth Amendment interest in a container, place, and/or other property without necessarily being physically present. Yet in the case at bar the Petitioner urges that Xavier Padilla has no reasonable expectation of privacy or interest in the goods seized because he was not physically present at the time his container (the car) and its contents (the contraband) were illegally seized and searched.

Petitioner attempts to hurdle the abyss between its position and this Court's Fourth Amendment decisions by claiming that Respondents' constitutional rights were not violated because the illegal seizure did not delay the return

of the car or its cargo to them.[17] Petitioner's brief at 22-23. The implications of this argument are frightening. In essence, Petitioner asks this Court to issue two rulings which are unprecedented and which would remove the heart and soul of the Fourth Amendment. First, Petitioner asks the Court to permit random, baseless seizures of personalty by government agents. No opinion from this Court has ever intimated that it would so much as consider allowing seizures in the absence of even a reasonable suspicion of criminal conduct. In *United States v.*

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[17]Again, this argument was not made in the district or appellate courts. Further, Petitioner is incorrect; the record establishes that the arrival of the car was delayed. SER 70-71. Regardless, the length of the delay is insignificant; the fact that the seizure was made without even a reasonable suspicion of criminal activity establishes the constitutional violation.

Place, 462 U.S. at 706, the Court declared:

> Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.

(footnote omitted). *See also Delaware v. Prouse*, 440 U.S. at 655, *quoting United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)(even a "minimal intrusion" must be supported by reasonable suspicion of criminal activity). The fact that temporarily holding a traveler's luggage or surreptitiously copying an individual's personal papers may not actually interfere with the owners' use of their property does not exempt such governmental intrusions from the dictates

of the Fourth Amendment. This Court has repeatedly held that warrantless searches and seizures are presumptively unreasonable. *See, e.g., United States v. Karo*, 468 U.S. 705, 717 (1984). The Court must not now approve arbitrary intrusions based on nothing more than the whim of an investigating officer on the grounds of a lack of standing.

Secondly, Petitioner seeks to deprive Respondents of the right to object to the seizure of the car and its contents by analogizing the facts of this case to a case in which an owner or custodian loans property to a third party for that party's sole and exclusive use. This claim must fail for two reasons. First, while this Court may someday be presented with a case in which the facts justify such a ruling, under existing precedent, an owner maintains the right

to object to a seizure of property even when the property is in the hands of another:

> The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner.

United States v. Place, 462 U.S. at 705. This distinction is appropriate and practical in cases in which the offending law enforcement official makes the intrusion while lacking even a reasonable suspicion that evidence of a crime will be found. A groundless search will be brief; a seizure may deprive the owner or custodian of the property indefinitely. In the case of personalty, the owner or custodian may not even be told where the property is being taken. *Id.* at 710.

More importantly, the case at bar does not present the issue of whether an owner abandons the right to object to the seizure of personal property when the owner loans the property to another for the borrower's exclusive use. The record in the present case establishes that the owners of the car entered into a business agreement with Xavier Padilla by which they authorized him to use the car to transport the contraband for which he was responsible. Xavier Padilla did not loan the car to Arciniega; he hired Arciniega, gave him specific instructions as to his method and route of travel, provided him with a telephone number to call in case problems arose, and travelled "virtually along with" the car during its two hundred twenty mile trip from Douglas to Tempe, Arizona. *United States v.*

Padilla, 960 F.2d at 860; 5/8/90 Tr. 69-73, 106-111.

None of the decisions cited by Petitioner, at 23-24, support its claim. Those decisions correctly hold that when an owner gives property to another for that individual's use, proof of complete and voluntary consent to search by the third party is binding on the owner. These cases assume a valid initial seizure of the property. The present case involves an invalid seizure of an automobile[11]. The question of whether

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[11]Further, this is not a situation of one individual who sells drugs to another and subsequently attempts to challenge the seizure of those drugs from the purchaser long after the seller's interests have been extinguished by the sale. This is a situation of multiple parties maintaining an interest in and to property which is the specific subject of the seizure. If "A" sells drugs to "B" and completes that transaction, "A" has no standing to challenge a subsequent search of "B's" car which results in the seizure of these same drugs which are

the subsequent search violated Respondents' Fourth Amendment rights was not decided below and is not before this Court[19].

Petitioner next claims that Respondents' possessory interest in the cargo does not support their ability to challenge this seizure because the subsequent search of the car revealed the cargo to be contraband. In effect, Petitioner claims that Respondents cannot object to the seizure of the container

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sought to be used against "A" in a conspiracy prosecution. However, if "A" hires "B" to transport drugs from one location to another, "B" drives the car, "A" supervises that enterprise, then both "A" and "B" retain a Fourth Amendment interest as to the seizure of that property. That is the case at bar.

[19]As conceded elsewhere by Petitioner. *See* Petitioner's brief at 19. *See also* footnote 3, *supra*.

because a later search revealed that it contained illegal goods.[20] This position is, of course, contrary to every decision in which this Court has been called upon to address such a contention.

In Wong Son v. United States, 371 U.S. 471, 484 (1963), this Court held that a search is not made valid by what it subsequently discloses. Petitioner urges that a standing analysis should in part depend upon the results of that search. This is a rule that is inconsistent with prior precedent of this Court (albeit in a probable cause

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[20]Petitioner's brief, at 25, n. 9, cites a string of cases in which the courts held that, following the lawful seizure and search of a package containing contraband, law officers could properly insert a tracking device in the container. Obviously, those cases have no application here due to the fact that the initial seizure of the "container" was illegal.

analysis context) and contrary to the purposes of the Fourth Amendment.

Obviously, the exclusionary rule serves to restrain overzealous and malevolent police officers only if they cannot use the fruits of their illegal searches in America's courts. Should this Court hold to the contrary, the exclusionary rule would cease to deter law enforcement officials from the arbitrary seizures and searches that the Fourth Amendment was designed to prohibit.

B. Reasonable expectation of privacy

According to the testimony of drug enforcement agent Plover, Xavier Padilla was actively involved in the actual transportation and was "ultimately responsible" for seeing that the car and its cargo safely proceeded from Douglas

to Phoenix, Arizona, and on to California. 960 F.2d at 860. Great care was taken to ensure that the contraband would not be seized. The drugs were first wrapped in white paper. These packages were labeled "pollo", the Spanish word for chicken. The packages were placed in the locked trunk of an automobile. The automobile was registered to and owned by a United States Customs agent, Respondent Donald Simpson. The car was driven into the United States by his wife, Respondent Maria Simpson. Mr. Simpson's ownership decreased the chances that the car would be searched at the border or stopped thereafter due to the fact that law officers are unlikely to interfere with the travels of a fellow officer.

Xavier Padilla went from Douglas to the Phoenix area on the day that the car

and contraband were making the same trip so that he would be available if problems or questions arose while the car was in transit. He kept in telephonic contact with a confederate in Douglas while the car was in route. Once the car arrived, following the seizure and the driver's agreement to become an informant, the driver - pursuant to orders from Xavier Padilla - called Mr. Padilla for instructions. Xavier Padilla sent his wife and brother to pick up the car.

Based on this uncontradicted evidence, the district court and court of appeals concluded that Xavier Padilla had a reasonable expectation of privacy in the car, the packages, and the contraband so as to permit him to object to the Fourth Amendment violation. The courts' conclusions were clearly correct.

In deciding whether an individual has the right to object to a Fourth Amendment violation courts must consider whether the complainant had a subjective expectation of privacy and whether that expectation is one which society would recognize as reasonable. *Rawlings v. Kentucky*, 448 U.S. at 104-105. A comparison of the evidence in *Rawlings* and the facts of the present case demonstrates the correctness of the lower courts' rulings.

In *Rawlings*, immediately before the police arrived, the defendant dumped illegal drugs into a purse owned by an acquaintance he had met only a few days before. *Id.* at 101-102, n. 1. He did so without any preexisting agreement with the purse's owner and took no steps to ensure that others would not have access to the purse. The defendant admitted

that he did not believe the purse would be free from governmental intrusion. *Id.* at 104-105. Under these facts, this Court properly held that Rawlings had neither a subjective nor an objective expectation of privacy that would permit him to challenge the search of the purse. *Id.* at 105-106.

In the present case, Xavier Padilla took careful measures to ensure that the contraband would not be found. It was wrapped in white paper that was marked so that it appeared to contain chicken. The packages were placed in the locked trunk of a vehicle registered to a law enforcement official. Mr. Padilla hired and instructed the driver, travelled to the destination of the cargo and maintained contact with a confederate located at the starting point of the journey. There can be little doubt that

Mr. Padilla maintained a subjective expectation of privacy.

Clearly, this is an expectation of privacy that society must recognize as objectively reasonable. In today's mobile society, people travel by car regularly for business and personal reasons. When driving on interstate highways, we do not forfeit our Fourth Amendment rights. Without question, the most reasonable place to store property we wish to keep safe and private is the trunk of the car. The privacy interest one retains when hiring a private messenger to drive to a specified location to deliver goods in a locked trunk can be no less than the privacy interest one retains when sending a package through the mail. *See United States v. Ross*, 456 U.S. 798, 823 (1982).

If Petitioner's arguments are to be accepted, the Court must overrule every decision that it has issued governing the seizure of containers in transit. For Petitioner to prevail, the Court must accept seizures based on the whim of government agents; the Court must permit such seizures any time that the owner is not guarding the property. Simply put, a reasonable expectation of privacy does not depend on physical presence.

Finally, Petitioner claims, at 18-19, that the court of appeals ruling in this case will lead to the wholesale suppression of evidence and serve to convict minor defendants while permitting the worst offenders to go free. First, it must be remembered that evidence will be suppressed only in the rare cases in which a Fourth Amendment violation is established. More importantly, the court

of appeals has consistently followed this Court's rulings by focusing on the existence of privacy and possessory interests; in some cases, these interests may belong to a mere courier, while in others they will belong solely to a supervisor. The fact that individuals with greater control and ownership of the tools and fruits of crime may be able to challenge searches when less culpable defendants may not, arises from the same facts which subject major violators to punishment that is far more severe.

If, as Petitioner suggests, this case should be reversed, government agents will be free to seize property and conduct searches so long as the property owner is not present to object. The Constitution must not be rewritten to require us to keep all of our belongings around us to ensure that they will not be

the subject of arbitrary seizures by government officials.

CONCLUSION

In *Rakas*, *Rawlings*, and *Salvucci*[21], this Court moved away from rigid adherence to outmoded property law concepts in determining the right to object to searches and seizures under the Fourth Amendment. Automatic standing rules were abolished. Instead, the Court required a realistic analysis of all the evidence to determine whether a person has an interest in property that is seized or places that are searched. No longer does the Fourth Amendment turn on whether an individual is charged with a possessory offense or is merely present when a search or seizure occurs.

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[21]*United States v. Salvucci*, 448 U.S. 83, 91-92 (1980).

In this case, Petitioner urges a return to those arcane concepts which brought with them the arbitrary and capricious application of the Fourth Amendment.

The court of appeals properly applied the rules set down by this Court. That court did not apply any automatic, *per se* rule as suggested by Petitioner. It simply analyzed the totality of facts available including membership in a joint venture.

The best evidence that the Ninth Circuit does not automatically grant coconspirators standing to raise Fourth Amendment objections on that ground alone is the case at issue here. The court specifically found that Respondents Warren Strubbe, Jorge Padilla and Maria Padilla do not have the right to raise such objections on this record. If

indeed there was an automatic rule of "joint venture standing", these Respondents would have been successful on direct appeal.

Petitioner also urges this Court to adopt a rule that would require constitutional protections to depend upon whether or not an individual has their property virtually in their arms at the time of a search or seizure. Absent such actual possession, Petitioner would place groundless seizures outside of the scope of the Fourth Amendment. Mere physical presence or actual possession is not the foundation on which our right to freedom from governmental harassment must rest.

Finally, the government urges that an individual does not have standing to challenge the seizure and/or search of a container if that container has

contraband in it. A search or seizure has never been made valid by what it subsequently discloses. The rule sought by Petition would render the Fourth Amendment and the exclusionary rule a nullity. The only time the exclusionary rule is applicable is in the case of a motion to suppress. A motion to suppress is filed only if an item of evidentiary value is found as a result of a search and/or seizure. By this argument Petitioner seeks to do indirectly what it cannot do directly -- render the protections of the Fourth Amendment meaningless because no one could ever raise them or assert them due to a lack of standing.

The decision of the Ninth Circuit Court of Appeals must be affirmed.

Respectfully submitted.[22]

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